

Montana Water Court  
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IN THE WATER COURT OF THE STATE OF MONTANA  
YELLOWSTONE DIVISION  
SHIELDS RIVER BASIN 43A  
PRELIMINARY DECREE

\* \* \* \* \*

CLAIMANT: Frank D Foley III

**CASE 43A-0302-R-2022**  
43A 195212-00

**NOTICE OF FILING OF MASTER'S REPORT**

This Master's Report was filed with the Montana Water Court on the above stamped date. Please review this report carefully.

You may file a written objection to this Master's Report within **10 days** of the stamped date if you disagree or find errors with the Master's findings of fact, conclusions of law, or recommendations. Rule 23, W.R.Adj.R. If the Master's Report was mailed to you, the Montana Rules of Civil Procedure allow an additional 3 days be added to the 10-day objection period. Rule 6(d), M.R.Civ.P. If you file an objection, you must serve a copy of the objection to all parties on the service list found at the end of the Master's Report. The original objection and a certificate of mailing to all parties on the service list must be filed with the Water Court.

If you do not file a timely objection, the Water Court will conclude that you agree with the content of this Master's Report.

## MASTER'S REPORT

The above-captioned claim appeared in the Preliminary Decree for Basin 43A. The claim did not receive objections or notices of intent to appear, but did receive issue remarks during the DNRC's claims reexamination.

The claim was consolidated into Case 43A-0302-R-2022 to resolve the issue remarks.

### FINDINGS OF FACT

1. Claim 195212-00 appeared in the Preliminary Decree for Basin 43A as an irrigation claim. Claim 43A 195212-00 received the following substantive issue remarks:

FLOW RATE MAY REQUIRE MODIFICATION BASED ON RESOLUTION OF MAXIMUM ACRES ISSUE.

THE GALLATIN COUNTY WATER RESOURCES SURVEY (1953) APPEARS TO INDICATE 30.00 ACRES IRRIGATED. A DESCRIPTION OF THESE ACRES IS IN THE CLAIM FILE.

2. On March 31, 2022, the Court set a filing deadline requiring the Claimants to work with the DNRC under §85-2-248(5), MCA to address the issue remarks on the claim. The deadlines imposed in the Courts initial consolidation order were extended in an Order Granting Motion for Extension of Time on July 18, 2022.

3. On September 6, 2022, DNRC Water Resources Specialist Mary Crable filed her *Memorandum* in this matter. Ms. Crable's *Memo* states that she was contacted by Jeremy Michael, counsel for claimant Frank D. Foley III, on April 14. In her *Memo*, Ms. Crable states that the claim erroneously listed Larry Lippon and Peter G. Stewart as additional claimants, and that ownership of the claim had since been updated to remove the errant claimants leaving only Mr. Foley. Ms. Crable's *Memo* goes on to state that during claim examination the DNRC claim verifier noted that there was not a 1979 aerial photo available, and therefore, the issue remarks above were based on a 1951 WRS aerial photo. However, because the priority date on claim 43A 195212-00 is June 6, 1972, more than 20 years after the photo used in the verification process, the DNRC cannot conclusively determine that the acres irrigated should be reduced from 40 acres to 30 acres as stated in the issue remark.

4. In addition to the *Memo* filed by Ms. Crable, claimant Frank D. Foley III filed a *Motion to Remove Issue Remarks from Claim 43A 195212-00 and Request to Update Caption and Service List*. The *Request to Update Caption and Service List* is based on the previously stated updates to the ownership of claim 43A 195212-00. Further, the *Motion* states that based on information in the claim file, as well as the statements made in Ms. Crable's *Memo*, the prima facie status afforded the Statement of Claim for claim 43A 195212-00 has not been overcome with respect to the maximum acres and flow rate elements. Therefore, Mr. Foley asserts that the issue remarks should be considered resolved and removed without modification to the claim.

#### PRINCIPLES OF LAW

1. A properly filed Statement of Claim for an existing water right is prima facie proof of its content. Section 85-2-227, MCA; Rule 10, W.R.Adj.R.

2. Prima facie proof may be contradicted and overcome by a preponderance of the evidence. Rule 19, W.R.Adj.R.

3. A preponderance of the evidence is evidence that shows a fact is "more probable than not." *Hohenlohe v. State*, 2010 MT 203, ¶ 33, 357 Mont. 438, 240 P.3d 628.

4. If prima facie status is overcome, the burden shifts back to the claimant to demonstrate historical use. *79 Ranch v. Pitsch*, 204 Mont. 426, 432-33, 666 P.2d 215, 218 (1983).

5. Section 85-2-248(2), MCA, requires that the Water Court resolve all issue remarks that are not resolved through the objection process. *See also* Rule 7, W.R.Adj.R.

6. The Water Court may use information submitted by the DNRC, the Statement of Claim, and any other data obtained by the Court to evaluate a water right. Sections 85-2-227, -231(2), MCA.

7. When resolving issue remarks, the Water Court must weigh the information resulting in the issue remark and the issue remark against the claimed water right. Section 85-2-247(2), MCA. The factual evidence on which an issue remark is based must meet the preponderance of evidence standard before the prima facie status of a claim is

overcome. 43Q 200996-00 et al., Order Establishing Volume and Order Closing Case, at 18, June 8, 2015.

### CONCLUSIONS OF LAW

1. The evidence in the record is sufficient to resolve the issue remarks placed on the above-captioned claim.

2. Based on the information contained in the claim file, coupled with the statements made in Ms. Crable's *Memo*, the issue remarks do not overcome the prima facie status afforded the Statement of Claim for claim 43A 195212-00. Therefore, the elements of the claim should remain as they appear on the abstract, and the issue remarks should be removed.

### RECOMMENDATIONS

Based on the foregoing Findings of Fact and Conclusions of Law, this Master recommends that the Court adopt the changes as outlined above.

A post decree abstract of the water right claim reflecting the recommended changes is attached to this Report.

### **ELECTRONICALLY SIGNED AND DATED BELOW.**

#### **Service Via Electronic Mail:**

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*Caption Updated: 12/23/2022*

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**POST DECREE  
ABSTRACT OF WATER RIGHT CLAIM  
SHIELDS RIVER  
BASIN 43A**

**Water Right Number:** 43A 195212-00 STATEMENT OF CLAIM

**Version:** 3 -- POST DECREE

**Status:** ACTIVE

**Owners:** FRANK D FOLEY III  
PO BOX 2447  
COLUMBUS, GA 31902

**Priority Date:** JUNE 6, 1972

**Type of Historical Right:** USE

**Purpose (use):** IRRIGATION

**Irrigation Type:** SPRINKLER

**Flow Rate:** 75.00 GPM

**Volume:** THE TOTAL VOLUME OF THIS WATER RIGHT SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

**Climatic Area:** 4 - MODERATELY LOW

**Maximum Acres:** 40.00

**Source Name:** SPRING, UNNAMED TRIBUTARY OF SOUTH FORK FLATHEAD CREEK

**Source Type:** GROUNDWATER

**Point of Diversion and Means of Diversion:**

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		NWSWNW	34	3N	6E	GALLATIN

**Period of Diversion:** JUNE 5 TO SEPTEMBER 30

**Diversion Means:** PUMP

**Period of Use:** JUNE 5 TO SEPTEMBER 30

**Place of Use:**

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	40.00		SWNW	34	3N	6E	GALLATIN

**Total:** 40.00